IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, ex. rel. JEREMIAH W. (JAY) NIXON, Attorney General Relator, vs. THE HONORABLE RALPH JAYNES, Circuit Judge, Randolph County, and NORMA PRANGE, Circuit Clerk Randolph County, Respondents.	)	SC 83424

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF RANDOLPH COUNTY

RESPONDENTS' STATEMENT, BRIEF, AND ARGUMENT

GWENDA R. ROBINSON
Missouri Bar No. 43213
District Defender, Office B
Eastern Appellate/PCR
1221 Locust Street
Suite 350
St. Louis, Missouri 63103
(314) 340-7658

Attorney for Respondents

Description **Page No.**

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

This is an original proceeding in certiorari pursuant to Missouri Supreme Court Rules 84.22 to 84.26, inclusive. On August 31, 2000, Michael Morrow filed a petition for writ of habeas corpus in the Circuit Court of Randolph County, Missouri. On December 22, 2000, the Honorable Ralph Jaynes, Circuit Judge of Randolph County, granted a writ of habeas corpus, vacated Morrow's sentences and judgments in St. Louis City Cause Nos. 981-3703 and 941-1980A, and remanded the cases in order for Morrow to withdraw his guilty plea in St. Louis City Cause No. 981-3703 and his confession to probation revocation in St. Louis City Cause No. 941-1980A. The Western District Court of Appeals denied Relator's petition for a writ of certiorari on March 2, 2001. This Court issued its preliminary writ on March 16, 2001.

This Court has jurisdiction under Missouri Constitution, Article V, Section 4(1) and Missouri Supreme Court Rules 84 and 91.

STATEMENT OF FACTS

Respondents will refer to the record as follows: Legal File, "(L.F.)". All statutory references are to RSMo 2000 unless otherwise indicated.

On April 30, 1999, Michael Morrow appeared in person and by counsel in St. Louis City Cause No. 981-3703 to answer the charge of class C felony possession of a controlled substance (L.F. 53-54). On that date, Morrow pled guilty to the charge on condition that the plea court would sentence him to long-term drug treatment under Section 217.362 (L.F. 53).

The plea court found Morrow to be a prior and persistent drug offender and a prior and persistent felony offender (L.F. 79-80). Prior to sentencing, Morrow's plea attorney stated the following:

> MR. DAVIS: Your Honor, pursuant to earlier discussions regarding this case, we would request that any sentence that is imposed be imposed pursuant to Revised Missouri Statute 217.362. And we would ask that the client be permitted to enter that two year drug treatment program with the possibility of being brought out on probation with respect to any sentence which may be imposed in this case.

(L.F. 71).

Then, the plea court imposed a sentence of eighteen years pursuant to provisions of Section 217.362, stating the following:

> Mr. Morrow, I've given you a very substantial sentence, much higher

than the sentence recommended by the State. But, I've also given you a chance to go to the Department of Corrections, participate in a special intense drug treatment program that the Department of Corrections offers and then if you really apply yourself in that program and take it seriously you'll have a chance to get probation back.

(L.F. 14, 16, 73-74).

The plea court subsequently revoked probation in another case, St. Louis City Cause No. 941-1980A, and stated, "I'm running them both under Section 217.362 to give you a chance to go into this long term treatment program . . . you'll be in that program for anywhere between twelve and twenty-four months" (L.F. 86-87).

The sentence and judgment in St. Louis City Cause No. 981-3703 and St. Louis City Cause No. 941-1980A reflected the plea court's pronouncements that Morrow was sentenced under Section 217.362 (L.F. 12-17).

Authorities delivered Morrow to the Department of Corrections to begin serving his sentence on or about May 5, 1999 (L.F. 8). On October 27, 1999, the Department of Corrections advised the plea court and Morrow that he was not eligible for the long-term drug treatment program (L.F. 9, 17).

Morrow subsequently filed his petition for writ of habeas corpus, claiming that his "guilty plea was not voluntarily and knowingly made since he was under a mistaken belief at the time of his plea that he would be eligible for the LTTCD program" (L.F. 10, 18-23). Morrow also contended that he "was not and could not

have been cognizant of his claim until the ninety day time limits under Rule 24.035 had expired"; he contended that he discovered he was ineligible for the long term drug treatment program sixty days after his Rule 24.035 motion would have been due (L.F. 8, 18-23).

In its Judgment dated December 22, 2000, Respondent Jaynes granted Morrow habeas corpus relief finding that "[s]ince [Morrow] did not know, nor could he have known, that he was not going to be placed in the long-term treatment program under [Section] 217.362, RSMo., until the 90 day time limit had expired under Rule 24.035, habeas corpus relief is appropriate" (L.F. 96-97). Respondent Jaynes reasoned that Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000) was inapplicable because Morrow did not have the opportunity to raise the voluntariness of his plea in a post-conviction proceeding (L.F. 97). Respondent Jaynes also noted it was not addressing "manifest injustice", but that it was following Brown v. Gammon, 947 S.W.2d 437 (Mo. App. W.D. 1997) (L.F. 97).

The State filed a motion for reconsideration and Respondent Jaynes denied the motion (L.F. 3, 99-101). The State, Relator, filed for a writ of certiorari in the Missouri Court of Appeals of the Western District and the appellate court denied that petition on March 2, 2001.

Relator sought an original writ of certiorari from this Court on March 5, 2001. This Court issued its preliminary writ on March 16 (L.F. 117).

POINT

I.

Relator is not entitled to an order quashing the writ of habeas corpus because Respondent Jaynes did not exceed his jurisdiction in granting Morrow's petition for writ of habeas corpus. As a preliminary matter, this Court should decline to review Relator's first point on appeal because Relator failed to raise in the habeas corpus proceedings below that it was entitled to an order quashing the writ on grounds that the miscarriage of justice exception under Rule 91 did not include a "lack of knowledge" or "cause" exception, excusing the untimely filing of a post-conviction motion. In addition, Rule 91 did not preclude Respondent Jaynes from excusing Morrow's procedural default or his failure to timely challenge his guilty plea under Rule 24.035's time limitations. Morrow's procedural default was excusable under the exception recognized by this Court and applied by the Western District Court of Appeals in Brown v. Gammon, 947 S.W.2d 437 (Mo. App. W.D. 1997).

Brown v. Gammon, 947 S.W.2d 437 (Mo. App. W.D. 1997);

White v. State, 779 S.W.2d 571 (Mo. banc 1989);

Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970);

Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986);

Sections 217.362 and 532.010, RSMo;

Rules 24.035, 29.15, and 91.

ARGUMENT

I.

Relator is not entitled to an order quashing the writ of habeas corpus because Respondent Jaynes did not exceed his jurisdiction in granting Morrow's petition for writ of habeas corpus. As a preliminary matter, this Court should decline to review Relator's first point on appeal because Relator failed to raise in the habeas corpus proceedings below that it was entitled to an order quashing the writ on grounds that the miscarriage of justice exception under Rule 91 did not include a "lack of knowledge" or "cause" exception, excusing the untimely filing of a post-conviction motion. In addition, Rule 91 did not preclude Respondent Jaynes from excusing Morrow's procedural default or his failure to timely challenge his guilty plea under Rule 24.035's time limitations. Morrow's procedural default was excusable under the exception recognized by this Court and applied by the Western District Court of Appeals in Brown v. Gammon, 947 S.W.2d 437 (Mo. App. W.D. 1997).

The scope of review of habeas corpus proceedings by certiorari is based solely on "the absence or excess or usurpation of jurisdiction" on the part of the lower court. State ex rel. Danforth v. Bondurant, 566 S.W.2d 478, 480 (Mo. banc 1978). Certiorari is a narrow and inflexible remedy and all that can be done under it is either to quash or to refuse to quash the proceedings on which the complaint is made. State ex rel. Hill v. Davis, 488 S.W.2d 305, 308 (Mo. App. K.C.D. 1972).

In this case, Relator is not entitled to an order quashing the writ of habeas corpus because Respondent Jaynes did not exceed his jurisdiction in granting Morrow's petition for writ of habeas corpus.

As a preliminary matter, this Court should decline to review Relator's first point on appeal because Relator failed to raise in the habeas corpus proceedings below that it was entitled to an order quashing the writ on grounds that the miscarriage of justice exception under Rule 91 did not include a "lack of knowledge" or "cause" exception, excusing the untimely filing of a post-conviction motion (L.F. 25-32, 90-94, 99-101, 114-115). "In Missouri, parties are estopped from raising issues on appeal which were not raised at the trial court level". Walker v. Walker, 954 S.W.2d 425, 428 (Mo. App. E.D. 1997). Arguments raised for the first time on appeal are rejected. State ex rel. Helujon v. Jefferson County, 964 S.W.2d 531, 539 (Mo. App. E.D. 1998); see also, St. Louis Southwestern Ry. Co. v. Crunk, 594 S.W.2d 625, 629 (Mo. banc 1980) and Artman v. State Bd. Of Registration for the Healing Arts, 918 S.W.2d 247, 252 (Mo. banc 1996). Though a writ of certiorari is not an appeal, it is in the nature of an appellate process because of its review function. State ex rel. Southwestern Bell v. Brown, 795 S.W.2d 385, 386 (Mo. banc 1990).

This Court should reject Relator's first point on appeal because the lower courts were not given the opportunity to consider this argument and this Court should not allow Relator to raise it for the first time before the reviewing court.

Should this Court disagree and consider Relator's new argument on the

merits, the argument still fails. Though Rule 91 does not explicitly include an exception for "lack of knowledge" or "cause" to excuse the untimely filing of a Rule 24.035 post-conviction motion, Rule 91 did not preclude Respondent Jaynes from excusing Morrow's procedural default or his failure to timely challenge his guilty plea under Rule 24.035's time limitations.

Rule 91 provides that "[a]ny person restrained of liberty within this state may petition for a writ of habeas corpus to inquire into the cause of such restraint". Rule 91.01(b); Section 532.010. Rule 91 proceedings are limited to determining the "facial validity of confinement". State ex rel. Haley v. Groose, 873 S.W.2d 221, 222 (Mo. banc 1994). The facial validity of the confinement is determined on the basis of the entire record. State ex rel. Simmons, 866 S.W.2d 443, 445 (Mo. banc 1994). Habeas corpus is also available in cases where there are circumstances so rare and exceptional that a manifest injustice would result in the absence of habeas corpus relief. Reuscher v. State, 887 S.W.2d 588, 591 (Mo. banc 1994).

In this case, Morrow's challenge to the voluntariness of his guilty plea was a challenge to the "facial validity of his confinement" (L.F. 7-23). A plea of guilty is constitutionally valid only to the extent it is voluntary and intelligent. Brady v. United States, 397 U.S. 742, 747, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970). In State v. Reese, 481 S.W.2d 497, 499 (Mo. banc 1972), this Court stated:

> A guilty plea is a waiver or relinquishment of . . . [constitutional] protections and if the plea is invalid because it is not knowingly and

> understandingly made . . . then it deprives the defendant of safeguards which are rightfully and properly his, no matter whether he is in fact innocent or guilty of the crime charged. This deprivation by means of a defective plea is itself manifest injustice, and one so deprived is entitled to have his guilty plea set aside and receive a trial on the merits, which is the appointed and appropriate place to arrive at a determination of guilt or innocence [citation omitted].

Therefore, it follows that if a guilty plea is invalid because it is involuntary, the criminal defendant's confinement on the basis of the involuntary plea is also invalid. See, State v. Roach, 447 S.W.2d 553 (Mo. 1969) *(vacating the defendant's plea because it was based on the mistaken belief that the defendant would receive probation).*

In addition, courts interpret Rule 91 to permit defendants to raise state habeas claims not raised in timely post-conviction motions where rare and exceptional circumstances exist to excuse the defendant's procedural default. See, State ex rel. Hahn v. Stubblefield, 996 S.W.2d 103 (Mo. App. E.D. 1999) *(holding defendant entitled to habeas corpus relief where trial counsel's failure to file a timely notice of appeal excused the defendant's failure to raise his habeas claims on appeal or in a Rule 29.15 motion).*

This Court established the exception permitting review of procedurally defaulted Rule 24.035 claims in White v. State, 779 S.W.2d 571 (Mo. banc 1989). In White, this Court stated:

> Procedural default in remedies previously available may provide the basis for denying a petition in habeas corpus, and the petitioner, at a minimum would have to establish that the grounds relied on were not "known to him" while proceedings under Rule 24.035 were available.

White, 779 S.W.2d at 572.

In Brown v. Gammon, 947 S.W.2d 437 Mo. App. W.D. 1997), the Western District Court of Appeals applied this exception to excuse a criminal defendant's default where the criminal defendant's habeas claim did not arise until after the time limits under Rule 24.035 had expired. Since the defendant could not have known or have reasonably discovered his claim until after the rule's time limitations had expired, the Western District held that a petition for habeas corpus under Rule 91 was the appropriate remedy. Brown, 947 S.W.2d at 440.

The Western District's holding complied with federal law establishing that "cause" for procedural default exists where the factual or legal basis for a claim was not reasonably available to counsel or where some interference by officials made compliance impracticable. Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986); McCleskey v. Zant, 499 U.S. 467, 493-494, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991).

"Where a defendant has procedurally defaulted a claim [arising from a guilty plea], the claim can be raised in [federal] habeas if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent". Bousley v. United States, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998).

Existence of "cause" for procedural default turns on whether the defendant can show that some objective factor external to the defense impeded his efforts to comply with the state's procedural rule. Murray, 106 S.Ct. at 2645. "Prejudice" also exists if the criminal defendant can show that he suffered actual prejudice resulting from the errors of which he complains. Murray, 106 S.Ct. at 2644; McCleskey v. Zant, 111 S.Ct. at 1470.

In Brown, the Western District found "cause" and "prejudice" and excused the criminal defendant's procedural default or his failure to timely challenge his guilty plea under Rule 24.035's time limitations. Id. at 440-441. The Western District found: 1) the claim, which the criminal defendant presented in his petition for writ of habeas corpus, was factually and legally unavailable to him prior to Rule 24.035's filing deadline; and, 2) the defendant was prejudiced by his procedural default because the guilty plea challenged under Rule 91 was involuntary. Id. The defendant's plea was based on his reasonable belief that the plea court would release him on probation after 120 days of imprisonment if he completed a substance abuse treatment program. Id. When the plea court denied probation after the defendant completed the substance abuse treatment program, the plea court rendered the defendant's guilty plea involuntary. Id.

Similarly, Morrow's procedural default was excusable and habeas corpus was the appropriate remedy. Morrow's procedural default was excusable under the exception established by this Court and applied by the Western District Court of Appeals in Brown v. Gammon, 947 S.W.2d 437 (Mo. App. W.D. 1997).

Relator is incorrect in its assertion that Morrow failed to make a showing that the grounds relied on in his petition for writ of habeas corpus were not known to him while proceedings under Rule 24.035 were available (Relator's Brief p. 18-21). Relator argues that Morrow knew or should have known at the time of sentencing or at the time of his incarceration that he was not going to receive long-term drug treatment (Relator's Brief p. 18-21). However, there is no factual basis in the record from which to impute such knowledge and in seeking to impute this knowledge to Morrow, Relator overlooks material facts and misconstrues other facts.

Relator overlooks the material fact that Morrow is a layperson, not a lawyer or judge, and as such Morrow, is not charged with knowing the law. Though the plea court failed to notify the Department of Corrections that it was considering Morrow for the long term drug treatment program as required, there is no factual basis in the record from which to impute Morrow's knowledge of the plea court's failure or Morrow's understanding of this prerequisite to enrollment (L.F. 1-117). See, 217.362.2. Rather, the record reflects that Morrow had no reason to believe at sentencing that the plea court had not complied with the statutory prerequisites for his enrollment in the long-term drug treatment program (L.F. 3, 38).

Morrow had no choice but to rely upon the plea court's representation that treatment under Section 217.362 was forthcoming (L.F. 4, 21-22). He had no control over whether or when he would be placed in a long-term drug treatment program under Section 217.362 (L.F. 9-10, 74-87). He could only trust that the

plea court spoke with authority when it told him that he would eventually be in the Department of Corrections' intense drug treatment program for "twelve and twenty-four months" (L.F. 9-10, 74-87).

Relator also overlooks the material fact that once in the Department of Corrections, Department of Corrections' officials similarly made affirmative representations that Morrow would be enrolled in the long-term drug treatment program. The plea court had sentenced Morrow to an institutional treatment program under Section 559.115 before, but Morrow had no reason to believe that institutional procedures, followed for his enrollment in a program under *Section 559.115*, were the same or similar to those necessary for his enrollment in a long-term drug treatment program under *Section 217.362* (L.F. 17). "From the onset of [Morrow's] arrival to the Department of Corrections, correctional officials continued to tell [Morrow] he was eligible for the LTCCD program" (L.F. 36-37). "[O]fficials kept [Morrow] under an illusion he would be allowed to participate in the program" even though officials took no action to place Morrow into the program at the beginning of his incarceration (L.F. 37).

After repeatedly hearing the affirmations of correctional officials, any doubt Morrow had about his enrollment in the long-term drug treatment program was removed (L.F. 10). Morrow relied on the representations of Department of Corrections' officials because only they had the authority to carry out the procedures necessary for his enrollment in the long-term drug treatment program (L.F. 10).

In the end, external factors at the Department of Corrections foreclosed Morrow from eligibility and enrollment in the long-term drug treatment program (L.F. 17). After applying bureaucratic procedures, officials at the Department of Corrections determined Morrow did not meet the prerequisite to long-term drug treatment under Section 217.362 of having "sufficient prior convictions" (L.F. 17).

These same external factors at the Department of Corrections determined that Morrow would receive notice of his ineligibility on October 27, 1999, approximately sixty (60) days after his post-conviction motion would have been due (L.F. 8, 17, 18-19). Rule 24.035 mandated that Morrow file his post-conviction motion within ninety days of the date of his delivery to the Department of Corrections on May 5, 1999, or on or about August 3, 1999 (L.F. 8); Rule 24.035. The time limitations expressed in Rule 24.035 are constitutional and make no provision for late filing if good cause is shown or for excusable neglect. Nimrod v. State, 14 S.W.3d 103, 108 (Mo. App. W.D. 2000); see also, Matthews v. State, 863 S.W.2d 388 (Mo. App. S.D. 1993) *(time limits for post-conviction relief were not suspended while the court considered shock probation).* Failure to file a Rule 24.035 motion within the time limits provided by the rule constitutes a complete waiver of any right to proceed under the rule. Stidham v. State, 963 S.W.2d 351, 353 (Mo. App. W.D. 1998).

Here, on account of factors external to him, Morrow didn't become aware of the factual and legal basis forming a claim for relief under Rule 24.035 until after the filing deadline had passed (L.F. 8, 17). Morrow's ineligibility for long-

term drug treatment formed the factual and legal basis for a challenge to his plea and Morrow could not have known or discovered this basis until he received notification of his ineligibility months after the filing deadline under Rule 24.035 had passed (L.F. 8, 17, 19). Therefore, as in Brown, Morrow established cause for any procedural default; he showed that an impediment external to him prevented him from complying with Rule 24.035 and that the factual and legal basis of his habeas claim was not reasonably available to him during the ninety day filing period under Rule 24.035. See, Brown, *supra*, and Murray, *supra*.

Morrow also established actual prejudice. Morrow's case is a case in which the criminal defendant entered a guilty plea on the basis of the mistaken belief that he would be placed in long-term drug treatment in order to become eligible for subsequent release on probation (L.F. 9-10, 21-22). Morrow "was under the mistaken belief at the time of the plea that he would be eligible for the LTTCD Program and upon successful completion of said program he would be released from prison on probation" (L.F. 9-10, 21-22).

If a defendant claims that his plea is involuntary because he pleaded guilty based on a mistaken belief about his plea agreement, the test is whether a reasonable basis for his belief exists in the record. McNeal v. State, 910 S.W.2d 767, 769 (Mo. App. E.D. 1995); Vernor v. State, 894 S.W.2d 209, 210 (Mo. App. E.D. 1995). If the defendant's belief is based upon positive representations on which he is entitled to rely, his belief is reasonable. Rick v. State, 934 S.W.2d 601, 606 (Mo. App. E.D. 1996); see also, Brown v. Gammon, *supra*.

In this case, Relator is incorrect in its assertion that Morrow's guilty plea was not induced by promises of long-term drug treatment or probation because there is a reasonable basis for Morrow's mistaken belief in the record (Relator's Brief p. 19). The record reflects that Morrow's attorney made reference to "earlier discussions" in making his recommendation that the plea court sentence Morrow under Section 217.362 (L.F. 71, 85). The record further reflects that although the plea court asked the prosecutor if she had anything to say about this recommendation, the prosecutor never disputed that these "earlier discussions" about Section 217.362 occurred or made any additional recommendations as to the sentence Morrow should receive (L.F. 71-72, 84-85). The reference to "earlier discussions" about Section 217.362 by Morrow's attorney and the prosecutor's acquiescence to the sentencing recommendation of Morrow's attorney lead to the inescapable conclusion that treatment under Section 217.362 was part of the plea agreement (L.F. 71-72, 84-85, 97).

Furthermore, the plea court's representations at sentencing provided Morrow with a reasonable basis for believing that he would be placed in long-term drug treatment in order to become eligible for subsequent release on probation. The plea court told Morrow that it was giving him a chance to participate in a "special intense drug treatment program" and that upon successful completion of the program the plea court would place him on probation (L.F. 74, 86-87). The plea court told Morrow: "you'll have a chance to get probation back"; "I want to give you another chance at probation"; and, "[s]o far, I've been able to give most

of [the people sent to the long-term treatment program] probation at the end of the program" (L.F. 74, 86-87).

When the Department of Corrections foreclosed Morrow from eligibility and enrollment in the LTTCD program under Section 217.362, his guilty plea was rendered involuntary and constitutionally invalid (L.F. 10, 21-22, 96-97); See, Brown, 947 S.W.2d at 440-441. A plea of guilty is constitutionally valid only to the extent it is voluntary and intelligent. Brady v. United States, *supra*. The plea is involuntary if the defendant has been misled or induced to plead guilty by fraud, mistake, misapprehension, fear, coercion or promises, and the defendant's plea must be withdrawn. Tillock v. State, 711 S.W.2d 203, 205 (Mo. App. S.D. 1986).

Here, Morrow's guilty plea was involuntary because he was induced to plead guilty on the basis of the mistaken belief that he would be placed in long-term drug treatment in order to become eligible for subsequent release on probation.

Therefore, Morrow showed that any procedural default was excusable for cause under Brown v. Gammon, 947 S.W.2d 437 (Mo. App. W.D. 1997) and that he was actually prejudiced by the error of which he complained. Morrow showed: 1) the Department of Corrections, an impediment external to him, prevented him from complying with Rule 24.035; 2) the factual and legal basis for his habeas claim was not reasonably available to him during the ninety day filing period under Rule 24.035; and, 3) the guilty plea, which he challenged under Rule 91, was involuntary, constitutionally invalid and resulted in his wrongful conviction

and imprisonment (L.F. 8-10, 18-22, 95-98). Accordingly, Respondent Jaynes' reliance upon Brown does not require quashing the writ.

In addition, Respondent Jaynes' reliance upon Brown does not contravene this Court's decision in Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000). Clay is distinguishable from Brown and Morrow and this Court's opinion in Clay did not overrule Brown or abrogate the exception that this Court established in White v. State, 779 S.W.2d 571 (Mo. banc 1989).

As distinguished from the criminal defendant in Clay, Brown and Morrow never had the opportunity to file successive state claims for relief from their convictions so that it cannot be said that they abused the writ (L.F. 10); see also, Brown, 947 S.W.2d at 439-440. In McCleskey v. Zant, 499 U.S. 467, 477, 111 S.Ct. 1454, 1461, 113 L.Ed.2d 517 (1991), the Supreme Court held that a writ may be abused when, in a subsequent petition, a petitioner for the first time raises a claim that could have been raised before but was omitted from the earlier petition because of inexcusable neglect. The criminal defendant in Clay had already sought relief on direct appeal and under post-conviction rule and he alleged a new ground for relief for the first time in his habeas petition. Clay, 37 S.W.3d at 216-217.

The criminal defendant in Clay petitioned for writ of habeas corpus on new grounds that the sentencing court found him a prior offender and removed sentencing from the jury on the basis of a prior expunged conviction. Id. at 217. Although the prior conviction had been expunged years before the trial court's

prior offender finding in his most recent case, the criminal defendant failed to raise the existence of the expungment order as a claim on direct appeal or in his subsequent post-conviction proceeding. Id. at 216 and 218. The criminal defendant in Clay did not tender any excuse and complained only that "manifest injustice" had occurred. Id. at 217.

Relying on federal law establishing the applicability of the "manifest injustice" standard, this Court in Clay held that the "manifest injustice" or "actual innocence" standard was of no avail to claims of error committed during the sentencing process. Id. at 218. This Court further held that errors in sentencing in non-capital cases were only actionable in habeas corpus if the court had no jurisdiction to impose the sentence in question. Id. Since the "manifest injustice" standard was not available to the criminal defendant and the defendant did not challenge the court's jurisdiction to impose sentence, this Court held that habeas corpus relief for him was inappropriate. Id.

Conversely, the "miscarriage of justice" standard and the standard applicable to non-capital sentencing errors need not have been addressed in determining whether habeas corpus relief was appropriate for Brown and Morrow (L.F. 97). "Manifest injustice" is essentially the same as the term, "miscarriage of justice" or "fundamental miscarriage of justice" used in federal habeas cases to describe an exception which allows a criminal defendant to raise a procedurally defaulted claim in federal habeas. Duvall v. Purkett, 15 F.3d 745, 747 n. 3 (8th Cir. 1994); see also, Clay, 37 S.W.3d at 217. The "miscarriage of justice"

exception is explicitly tied to the criminal defendant's innocence. Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) *(citing Kuhlman v. Wilson, 477 U.S. 436, 452, 106 S.Ct. 2616, 2626, 91 L.Ed.2d 364 (1986)* and Murray, 106 S.Ct. at 2649. In order to establish a "miscarriage or justice" or "actual innocence", the defendant must demonstrate that "in light of all of the evidence, it is more likely than not that no reasonable juror would have convicted him". Schlup, 115 S.Ct. at 867-868. In federal habeas cases, the criminal defendant must show "actual innocence" or that a "fundamental miscarriage of justice" would result from a failure to entertain the procedurally defaulted claim *only if* he is unable to show "cause" and "actual prejudice". Bousley, 118 S.Ct. at 1611; Brownlow v. Groose, 66 F.3d 997, 999 (8th Cir. 1995).

Similarly, Brown and Morrow need not have shown "manifest injustice" or that they were actually innocent of the offense because, as previously discussed, they showed "cause" and "prejudice" (L.F. 8-10, 18-22, 95-98); Brown, 947 S.W.2d at 440-441; see also, *e.g*. Brownlow v. Groose, *supra (examining for manifest injustice after the criminal defendant conceded his inability to establish cause to excuse his procedural default).*

Nor did the Western District and Respondent Jaynes have to apply the standard applicable to non-capital sentencing errors in determining whether habeas corpus was the appropriate remedy in Brown and Morrow. Brown and Morrow did not contend that the trial court erred in imposing the sentences they received;

they challenged the voluntariness and hence, the constitutional validity of their guilty pleas (L.F. 7-23); Brown, 947 S.W.2d at 438.

Therefore, Respondent Jaynes' reliance upon Brown v. Gammon, 947 S.W.2d 437 (Mo. App. W.D. 1997) does not contravene this Court's decision in Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000) and Respondent Jaynes' reliance upon Brown v. Gammon, 947 S.W.2d 437 (Mo. App. W.D. 1997) does not require quashing the writ. Relator is not entitled to an order quashing the writ of habeas corpus because Respondent Jaynes did not exceed his jurisdiction in granting Morrow's petition for writ of habeas corpus.

CONCLUSION

Wherefore, for the foregoing reasons, Respondents pray that this Court deny Relator's petition for a writ of certiorari and refuse to quash the writ.

Respectfully submitted,

_____

Gwenda R. Robinson
Missouri Bar No. 43213
District Defender, Office B
Eastern Appellate/PCR
1221 Locust Street
Suite 350
St. Louis, Missouri 63103
(314) 340-7658

Attorney for Respondents

CERTIFICATE OF SERVICE

I, hereby certify that on this _____ day of May 2001, two true and correct copies of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to: Michael Morrow, Reg. No. 292486, Moberly Correctional Center, P.O. Box 7, Moberly, MO 65270; the Honorable Ralph Jaynes, Circuit Judge of Randolph County, Missouri, 223 North Williams Street, Moberly, MO 65270; Norma Prange, Circuit Clerk of Randolph County, Missouri, 223 North Williams Street, Moberly, MO 65270; and, Cassandra K. Dolgin, Assistant Attorney General, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

_____
Gwenda R. Robinson

CERTIFICATE OF COMPLIANCE

In accordance with Missouri Supreme Court Rule 84.06, I hereby certify that this brief includes the information required by Rule 55.03 and Special Rule No. 1(b) in that this brief was prepared with Microsoft Word, uses Times New Roman 13 point font, and does not exceed 27,900 words. The word-processing software identified that this brief contains _____ words, excluding the cover page, signature block, and certificates of service and of compliance. In addition, the enclosed diskette has been scanned for viruses and found virus free.

_____
Gwenda R. Robinson